

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FEB 27 2003

KENNETH J. MURPHY, Clerk
CINCINNATI, OHIO

TED MARCUM,

Petitioner,

vs.

WILLIAM A. TANNER, Warden,

Respondent.

Case No. C-1-02-425

JUDGE BECKWITH

MAGISTRATE JUDGE SHERMAN

RESPONSE TO FEBRUARY 10, 2003 ORDER

On February 10, 2003, this Court ordered Respondent to determine whether 1995 Butler County Jail medical records still exist with respect to the assault for which Marcum stands convicted. The short answer to this Court query is that said records were destroyed last year. (See, Exhibit A).

Respondent would further note in passing that assuming *arguendo* that Marcum's petition were not time barred, and assuming further that said records still existed, that said records would still **not** be entitled to consideration in federal habeas corpus. This is so because 28 U.S.C. Section 2254(e)(2) limits this Court to a consideration of the factual basis of the claim as presented to the state courts. Here Marcum has candidly conceded that he did not present the Butler County Jail medical records to the Ohio courts and he further has not even attempted to set forth a factual predicate that prevented him from obtaining the medical records for presentation to the Ohio courts.

